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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 541

BENEDETTO CINQUEGRANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Benedetto Cinquegrano prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered July 31, 1964. The opinion of the Court of Appeals is printed in the Appendix to the petition (A, pp. 1a-33a)* and is hereinafter discussed.

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1964 (A, p. 34a). The time to file this petition was extended to September 29, 1964 by order of Mr. Justice Goldberg, dated August 25, 1964 (A, p. 35a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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* References to the appendix will be preceded by the letter "A".

Questions Presented

1. Whether the presumption of continued participation in a conspiracy is applicable to, and affords sufficient basis for the conviction of, a defendant (a) who played a fringe role in a mass conspiracy, exercising "non-core" functions; (b) who by reason of his incarceration prior to the cut-off date of the statute of limitations, was physically restrained and precluded from further participation in the conspiracy; and (c) who did not participate in the conspiracy during the limitation period.

2. Whether the Court of Appeals properly reasoned that incarceration is sufficient to sustain the defense of withdrawal from a conspiracy only where the incarceration results from prior arrest or conviction on the very conspiracy in issue.

3. Whether the Court of Appeals properly construed and applied the decision of this Court in *Hyde* v. *U.S.*, 225 U.S. 347 (1912) on the issue of withdrawal from the conspiracy.

4. Whether a plea of guilty to charges of illegal narcotics trafficking by an alleged receiver of narcotics constitutes a sufficient affirmative act of withdrawal from an alleged narcotics conspiracy.

Statutes Involved

The statutes involved in the indictment are 21 U.S.C. §§ 173 and 174. The statute of limitations is found in 18 U.S.C. § 3282. These statutes are set forth in full in the Appendix hereto (A. pp. 36a-38a).

The Facts

After a trial lasting six weeks, petitioner was convicted in the United States District Court for the Southern District of New York of conspiracy to import and distribute narcotic drugs in violation of 21 U.S.C. §§ 173 and 174, and was sentenced to a prison term of eight years. Although the Court of Appeals reversed the judgment of conviction, it specifically overruled petitioner's contention that he was entitled "to acquittal under the statute of limitations as a matter of law" (A, p. 25a). Unless he obtains relief from this Court, petitioner will again be subjected to an oppressively lengthy trial.

The indictment, returned on August 15, 1962, charged a single conspiracy among twenty named defendants, twenty-one co-conspirators not named as defendants, and "divers other persons to the Grand Jury unknown," commencing in January of 1950 and continuing until the date of the filing of the indictment, to import narcotic drugs into the United States, to receive, conceal, buy and sell the drugs, and to dilute, mix and adulterate the drugs prior to their distribution throughout the United States, in violation of Sections 173 and 174 of Title 21 of the United States Code.*

In its opening statement, the government characterized the roles of the alleged members of the conspiracy as falling within seven basic groups. The first group was characterized as "the executive group" (17), and "consisted of five

* A Bill of Particulars filed by the government named eight other co-conspirators, and two supplemental Bills of Particulars, filed during the course of the trial over the objections of the defendants, named two other co-conspirators (71-81, 393-94, 1061-67, 1074-80). Numbers in parentheses refer to pages of the stenographic minutes of the trial.

individuals [Joseph Mogavero, a named defendant not on trial, Carmine Locascio, Angelo Loiacano, Rosario Mogavero and David "Pop" Smith] who directed the entire operation, making decisions and giving orders concerning the importation and distribution of large quantities of narcotic drugs" (17-18). The other six groups, in the order named, were characterized as "the exporters," "the international couriers," "the initial processors," the "warehouse men" or "plant men," "the domestic couriers" and "the wholesale receivers" (18-20). Petitioner was placed in the "seventh and final group of persons within this conspiracy," namely, "the individuals who would receive the drugs which were brought into the country by the other parties to the conspiracy" (20).

The Evidence of Petitioner's Participation in the Conspiracy

The only evidence implicating petitioner in the conspiracy came from the lips of Salvatore Rinaldo, the principal prosecution witness, who, according to the government, was a member of three of the seven groups, the "international couriers," the "warehouse men" and the "domestic couriers" (18-20) and who, according to his testimony, played the same role, among others, in this conspiracy as he did in the conspiracy involved in *United States* v. *Agueci*, 310 F. 2d 817, 822 [2d Cir., 1962] cert. den. 372 U.S. 959, namely, that of "central distributor."

Rinaldo testified that he was introduced to petitioner in October of 1951 by Rosario Mogavero at the Black Horse Inn, a restaurant and bar on Market Street in Manhattan which was Rinaldo's "hangout," and his central meeting place with members of the so-called "executive group" (38,

179-81, 1157-60). Mogavero told Rinaldo "that Cinquegrano would be picking up some goods from me, would I make an appointment with him, a meeting place. Cinquegrano and I got together, and we decided on meeting on Grand Street in the Bowery in the future" (181). A specific meeting was set for the day following the introduction, and in accordance with instructions from Rosario Mogavero, Rinaldo went to Joseph Mogavero's house in Manhattan, picked up a package which Joseph Mogavero told him contained "half a kilo" of heroin, and delivered the package to petitioner at Grand Street in the Bowery (181-83).

Thereafter, between November of 1951 and July of 1953, Rinaldo testified that he made some fifteen additional deliveries to petitioner, all of which involved the same sequence of events, namely, a conversation with Rosario Mogavero "in or around" the Black Horse Inn, a trip to Joseph Mogavero's house to pick up a package which he was told contained half a kilo of heroin, and a delivery of the package to petitioner at "Grand and the Bowery" (184-85, 193-94, 196-98, 200-01, 208-9, 230-31, 236-37, 237-38, 239-42, 242-46, 246-49, 250-52, 253-55, 255-58, 263-66).

In December of 1953, according to Rinaldo, he was instructed by Rosario Mogavero "to take orders" in the future from Joseph Mogavero and Carmine Locascio, and to find "a new plant" for any further acquisitions of narcotics (269-70). Rinaldo testified that in March or April of 1954, he had a conversation with Joseph Mogavero "in or around" the Black Horse Inn, and was told to deliver half a kilo to petitioner on the following day (272, 285-86, 289-291). He picked up half a kilo from his sister's house in the Bronx, the "new plant" where Rinaldo stored narcotics (269-84, 844-48), and delivered it to petitioner the following

day (285-86). Thereafter, in May, July, September, October, November and December of 1954, he testified that he made additional deliveries to petitioner, all of which involved the same sequence of events, namely a conversation with Joseph Mogavero "in or around" the Black Horse Inn during which he was told to deliver half a kilo to petitioner, a trip to his sister's house to pick up a package containing the specified amount of heroin, and a delivery of the package to petitioner at Grand and the Bowery (291-92, 311, 313-14, 326, 329-30, 351, 353-54, 360-64, 367-70).

After December of 1954, there were no further deliveries to petitioner until September of 1955 (378, 382, 388-89, 390-91, 425, 432-33, 440, 1185). At that time, in accordance with instructions from Joseph Mogavero, Rinaldo testified that he delivered half a kilo to petitioner at their usual meeting place (466-68). The final delivery to petitioner took place in October of 1955, when Rinaldo, again on instructions from Joseph Mogavero, delivered half a kilo to petitioner at the same place (472-74). Rinaldo made no further deliveries to petitioner after October of 1955. His testimony in this regard is, as follows (1187):

> "Q. Were there any further deliveries after October, 1955? A. No, sir.
> Q. Ever? A. No, sir.
> Q. Is that right? A. Yes, sir."

There is no evidence of any money passing between Rinaldo and petitioner in connection with any of the above deliveries. Rinaldo testified in this regard that he received no payment from the people to whom he delivered, and "wouldn't know" whether they made payment to anyone else (261-63).

There is no evidence whatever in the record linking petitioner with the conspiracy after October of 1955. On the contrary, at the close of the government's case and in support of his unsuccessful motion for a judgment of acquittal upon the grounds of double jeopardy and the statute of limitations. Petitioner proved that he was arrested and indicted in February of 1956 on charges of illegal possession of heroin and conspiracy to violate the federal narcotics laws, and imprisoned until March of 1958. A certified copy of the 1956 indictment was marked as Defendant Cinquegrano's Exhibit F for identification (2367-72, 2438-40), and by way of stipulation with the government and the consent of the trial court, was offered and received in connection with any and all motions made by petitioner (2515-17).

The prior indictment was filed on February 24, 1956, in the United States District Court for the Southern District of New York. Counts 7 and 8 charged petitioner and his co-defendant, one Gum Hoy Wong, with two substantive counts, one for the possession of 8 ounces, 350 grams of heroin on February 3, 1956, and one for the possession of approximately 8 ounces, 266 grams of heroin on February 17, 1956, a total of one-half kilo of heroin. Count 9 charged that commencing on or about November 1, 1955, and continuously thereafter to the filing of the indictment on February 24, 1956, petitioner conspired with his co-defendant "and others to the Grand Jury unknown" to violate the federal narcotics laws, including Sections 173 and 174 of Title 21. The endorsements on the indictment reveal, in pertinent part, that petitioner *pleaded guilty* to all three counts on April 4, 1956, and was sentenced on May 7, 1956, to confinement for two and one-half years

on Count 7. The Court suspended the imposition of sentence on Counts 8 and 9, and placed petitioner on probation for five years to commence upon the expiration of his sentence on Count 7. The government stipulated that petitioner was in prison until March 23, 1958, on which date he was conditionally released; that his conditional release expired on May 10, 1958; and that the five year probationary period expired on May 10, 1963, approximately nine months after the filing of this indictment (2515-17).

Petitioner did not testify in his own behalf, and offered no evidence before the jury. At the conclusion of the entire case, he renewed all his prior motions (2682-95), and vigorously contended that the issue of his withdrawal from the conspiracy was a question of law, not a question of fact (2694, 2784-85). The trial court denied all the motions "except the motion as to whether the arrest of Cinquegrano constituted a withdrawal," as to which decision was reserved until after the jury's verdict (2694-95). Although the trial court was obviously troubled by the withdrawal argument (2384-85, 2688, 2785-91), the motion for a judgment of acquittal on this ground was eventually denied, after the jury found petitioner guilty.

The Opinion Below

Recognizing that petitioner's conviction could be sustained only by resort to "the so-called presumption of continuity" (A, p. 11a)*, since there was no evidence of his

* It has often been said "that an individual who has joined a continuing conspiracy will be deemed to have continued his participation in that conspiracy until some affirmative act of withdrawal by him occurs" (*United States* v. *Russano*, 257 F. 2d 712, 716

participation in the conspiracy during the five years preceding the indictment, the Court of Appeals ostensibly rejected the applicability of the presumption to "the outer links" of a narcotics conspiracy—"buyers indifferent to their sources of supply and turning from one source to another, and suppliers equally indifferent to the identity of their customers" (A, p. 11a). The Court reasoned that while the purchase of narcotics might indicate "a willingness to repeat," it "scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction" (A, p. 12a). Accordingly, the Court concluded that "the Government must present evidence justifying the jury in finding beyond a reasonable doubt that the particular agreement into which a defendant entered continued into the period not barred by limitation, *Grunewald* v. *United States*, 353 U.S. 391, 397 (1957), *and the scope of his agreement must be determined individually from what was proved as to him*" (A, p. 13a, emphasis supplied).

It is respectfully submitted that at this point in the Court's opinion, the ultimate conclusion to be expected as to petitioner was a direction to acquit. Since the only proof as to petitioner was the "purchase" of narcotics,* and since the only permissible inference from such "purchases" was

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[2d Cir., 1958], and cases therein cited; see, also, *Hyde* v. *United, supra; United States* v. *Cohen*, 145 F. 2d 82, 90 [2d Cir., 1944], cert. den. 323 U.S. 799-800; *United States* v. *Consolidated Laundries Corporation*, 291 F. 2d 563, 573 [2d Cir., 1961]; *United States* v. *Cianchetti*, 315 F. 2d 584, 589 [2d Cir., 1963].

* As previously noted, there is no evidence in the record that petitioner paid Rinaldo or anyone else for the narcotics he received.

"a willingness to repeat" the only agreement reasonably inferable as to petitioner was to continue his "purchase" of narcotics *as long as he was physically able so to do.* Manifestly, petitioner did not agree to "purchase" narcotics for resale while he was in jail.

The Court of Appeals did not, however, direct petitioner's acquittal, and their failure to do so was based on the efforts of certain defendants other than petitioner to dispose of some impure heroin imported from Italy in the spring and summer of 1955. The proof, reasoned the Court, showed a single conspiracy divided into two phases. The first phase ended in March of 1958, upon the disposal of the last of the impure Italian heroin. The second phase commenced in April of 1958, with "an altered core" (A, p. 13a) and "wholly new sources of supply" (A, p. 14a).

Although the Court found "no evidence that would warrant a jury in finding that [petitioner became a party] to the activity that began in April, 1958" (A, pp. 16a-17a), it concluded that the jury could properly convict petitioner if it believed Rinaldo's testimony that the efforts to dispose of the bad Italian heroin continued beyond August 15, 1957, the conceded cut-off date of the Statute of Limitations. In other words, although there was no evidence that petitioner ever purchased any of the impure heroin or had any connection whatever with the efforts to dispose of it, and notwithstanding that petitioner was incarcerated between May, 1956 and March, 1958, while the efforts to move the bad heroin continued, the chance fact that it took three years for others to finally dispose of the impure narcotics was sufficient to sustain a conviction.

As to the issue of withdrawal from the conspiracy, the Court noted at the outset of its discussion that this Court "last spoke comprehensively on withdrawal from a conspiracy in the opinion of Mr. Justice McKenna for five justices in *Hyde* v. *United States*, 225 U.S. 347, 369 (1912)—the four dissenters not reaching this issue" (A, p. 20a). The *Hyde* opinion, said the Court, "laid down vigorous requirements for making out the defense of withdrawal" from a continuing conspiracy, requiring affirmative action of one of two types—"either the making of a clean breast to the authorities", or "communication of the abandonment in a manner reasonably calculated to reach co-conspirators" (A, p. 20a-21a).

After stating the so-called *"Hyde rule"* (A, p. 21a), the Court immediately recognized that the discussion in *Hyde* was directed to a core member of a conspiracy, and that the prelimitation conduct of that "core" member bore part of its fruit during the limitation period. Acknowledging the argument that the requirements of the *Hyde* case were "too severe" for fringe members of a continuing conspiracy, the Court stated that it "should be obliged to give most serious consideration to this argument if, as urged by the Government, mere proof of past dealings with the core sufficed to permit a jury to infer an agreement to participate in its continuing activities to the end of time" (A, p. 21a). However, reasoned the Court,

> "Since each defendant can be held only for that part of the conspiracy which he understood and assented to, and since the statute [of limitations] will begin to run for him when his own agreement terminates, it is neither unfair nor unreasonable to require affirmative demonstration that he was abrogating it at an earlier date" (A, p. 22a).

Turning to the individual defendants who claimed a withdrawal, the Court rejected petitioner's argument that his imprisonment destroyed the presumption of his continuing participation in the conspiracy, and required the government to come forward with independent evidence of continued participation. While it assumed "without deciding" that the arrest and confinement of a conspirator "for the very offense charged in the conspiracy indictment" would be "a sufficient 'affirmative act' to sustain the defense of withdrawal in the absence of countervailing evidence," it saw "no basis for going further" and applying that principle to petitioner, "who pleaded guilty to an unrelated narcotics offense" (A, p. 25a). The Court thereupon "overrule[d] Cinquegrano's claim that his 1956 incarceration entitled him to acquittal under the statute of limitations as a matter of law," and held that petitioner was obliged "to place the fact in evidence" in order to "raise a question for the jury on the issue of his withdrawal" (A, p. 25a).

REASONS FOR GRANTING THE WRIT

Summary

1. The petition presents for the consideration of the Court important questions of first impression, which vitally affect the fair administration of criminal justice in the Federal Courts. The questions are of general and recurring application, particularly in view of the current widespread use by the Government of the mass conspiracy indictment.

2. The general areas of law involved in this petition, namely, the presumption of continued participation in a

conspiracy, and the quality and quantum of proof necessary to demonstrate a withdrawal therefrom, are in vital need of clarification. The last time this Court spoke on these issues was in 1912 in *Hyde* v. *U.S., supra,* a 5:4 decision. In particular, the following specific issues, within the framework of these general areas of law, are raised for the first time:

(a) The import and legal effect to be accorded the incarceration of a conspirator during the alleged period of the conspiracy, including the relation between incarceration and the Government's burden of proof;

(b) The weight to be accorded the role of a conspirator in assessing a claim of withdrawal; and

(c) The sufficiency of a plea of guilty as an affirmative act of withdrawal.

3. The Court of Appeals has unreasonably construed and extended the *Hyde* decision, *supra,* beyond its fair intendment. In so doing, it has promulgated in its opinion a new rule of law, which requires any member of a conspiracy—even though his role therein is limited to fringe or "non-core" functions—to establish one of the following facts in order to make out the defense of withdrawal:

(a) That he has made a clean breast to the authorities;

(b) That he has communicated his abandonment of the conspiracy to his co-conspirators; or

(c) That he has been perviously arrested and confined on the very conspiracy in issue.

This new rule of law, we submit, overlooks the fact that a withdrawal by a fringe or "non-core" member of a con-

spiracy is *per se* effected by the physical restraint and removal inherent in his incarceration.

4. The narrow construction of the *Hyde* decision by the Court of Appeals for the Second Circuit below squarely conflicts with the interpretation and application of the *Hyde* decision by the Court of Appeals for the Ninth Circuit in *Buhler* v. *U.S.*, 33 F. 2d 382 (1929).

5. Even though petitioner was a "non-core" member of the conspiracy here charged, was arrested, pleaded guilty and was incarcerated during the period of the alleged conspiracy, and did not, during or subsequent to his incarceration, participate in the conspiracy charged, the Courts below rejected his claim that he was entitled to acquittal under the statute of limitations as a matter of law. As a result, the only avenue left open to petitioner in order to attain acquittal upon retrial is fraught with untoward consequences, including the forfeiture of his constitutional right to remain silent, and his exposure to the jury in this narcotics conspiracy case as a prior narcotics felon.

I

Petitioner's arrest and imprisonment destroyed the presumption of his continued participation in the conspiracy and caused the statute of limitations to commence running in his favor.

Petitioner was convicted by resort to the presumption that a conspirator who is once shown to have joined a conspiracy is deemed to continue as a member thereof. This presumption, however, is manifestly a rebuttable presumption. Like any rebuttable presumption, it "exists only until

contrary substantial evidence appears * * *. It forces the opposing party (defendant here) to go forward with proof, but, once he does go forward, the presumption is out of the case" (*People* v. *Richetti*, 302 N.Y. 290, 298; see, also, *Casey* v. *United States*, 276 U.S. 413, 418 [1928]; *Roviaro* v. *United States*, 353 U.S. 53, 63 [1957]; *United States* v. *Gibson*, 310 F. 2d 79, 81 [2d Cir., 1962]; 9 Wigmore on Evidence, Sections 2485-2491, 2530).*

The Court of Appeals "assum[ed] without deciding" that arrest and imprisonment "for the very offense charged in the conspiracy indictment" was "a sufficient 'affirmative act' to sustain the defense of withdrawal in the absence of countervailing evidence" (A, p. 25a). The assumption was hardly necessary, since the same Court of Appeals had expressly *decided* that point in *United States* v. *Consolidated Laundries Corporation, supra*, 291 F. 2d 563, 573, where it held:

> "That the arrest of a conspirator removes the presumption of continuing participation by him in the conspiracy is well established. *United States* v. *Carminati*, 2 Cir., 247 F. 2d 640, certiorari denied 355 U.S. 833, 78 S. Ct. 150, 2 L. Ed. 2d 113; *United States* v. *Russano*, 257 F. 2d 712, 715-716; *Sandez* v. *United States*, 9 Cir., 239 F. 2d 239, 243; *Cleaver* v. *United States*, 10 Cir., 238 F. 2d 766, 769."

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* The Court of Appeals alluded to the fact that proof of petitioner's arrest and imprisonment was offered only to the Court in connection with his motion for an acquittal. The potential prejudice to petitioner attendant upon informing the jury that he went to prison for illegal trafficking in narcotics can hardly be gainsaid. In light of this great potential for prejudice, the fact that his arrest and imprisonment were not technically "in evidence" should not serve to elevate form over substance. The government had ample opportunity to submit evidence that petitioner was connected with the conspiracy after 1956. If it had such evidence, it surely would have been forthcoming.

(See, also, *United States* v. *Allocco*, 234 F. 2d 955, 956 [2d Cir., 1956], cert. den. 352 U.S. 931, reh. den. 352 U.S. 990).

The Court of Appeals declined, however, to apply the *Consolidated Laundries* rule to petitioner, who was arrested on a charge different from that alleged in the indictment, since the purported basis of the rule was "the unlikelihood of the other conspirators' relying for further aid on a person known to be confined for the very offense in which they were engaging (A, p. 25a).

It is respectfully submitted that the distinction between an arrest on the particular conspiracy charged and an arrest on a different charge is a distinction without a difference so far as petitioner is concerned, and misconceives the import of incarceration. Petitioner was arrested and imprisoned in 1956 on charges of illegal possession of narcotics and conspiring to violate the narcotics law. If his arrest removed the presumption of continued participation in that conspiracy, it, *ipso facto*, removed the presumption of continued participation in this conspiracy, since his confinement precluded physical activity in the nature of receipt and distribution of narcotics, his alleged role in the conspiracy here charged. The essence of incarceration is physical restraint and impairment of mobility, regardless of the precipitating cause of the incarceration. The Court of Appeals erroneously focused upon the *cause* of the incarceration, whereas it is the *effect* which is rather controlling on the issue of withdrawal.

The erroneous approach of the Court below is highlighted by the testimony of the Government's own principal witness who conceded that the "core" of the conspiracy could not rely for further aid on a wholesale receiver who was

out of circulation. In answer to a question concerning the defendant, Sedotto, who like petitioner, was a member of the so-called "seventh and final group" of "wholesale receivers" (20), Rinaldo answered: *"How could I do business with him when he's in jail?"* (1436, emphasis supplied).

The untenable nature of the distinction between confinement on the same or a different charge is further highlighted by the fact that the conspiracy for which petitioner was imprisoned was subsequent in time to his active participation in the conspiracy involved here. Rinaldo testified that he never made any further deliveries to petitioner after October of 1955. The conspiracy for which petitioner was arrested allegedly commenced in November of 1955. To conclude that petitioner's arrest removed the presumption of his participation in the conspiracy for which he was arrested but did not remove the presumption of his participation in an earlier conspiracy in which he was no longer active is logically indefensible. His "continuous cooperation" in either conspiracy was no longer possible (*United States* v. *Kissel*, 218 U.S. 601, 607 [1910]; *Fiswick* v. *United States*, 329 U.S. 211, 216 [1946]).

Since petitioner's arrest and imprisonment in 1956 necessarily removed the presumption of his continuing participation in the conspiracy here charged—or, stated differently, since he overcame the "inference" of his "continued connection" with the conspiracy "by proving that he had ceased to participate" (*Sperry Gyroscope Co.* v. *National Labor Relations Board*, 129 F. 2d 922, 927-8 [2d Cir., 1942])—the statute of limitations commenced running in his favor. In order to toll the statute and start it running anew, the government, we submit, was obliged to bring

him back into the conspiracy by independent proof that he "continued his participation therein after his arrest" (*United States* v. *Consolidated Laundries Corporation, supra,* 291 F. 2d at p. 574). This the Government failed to do. The record contains no evidence that petitioner continued to have any connection whatever with the conspiracy after his arrest and imprisonment in 1956 (*Cf. United States* v. *Aqueci, supra,* 310 F. 2d at pp. 838-39; *Poliafico* v. *United States,* 237 F. 2d 97 [6th Cir., 1956], cert. den. 352 U.S. 1025, reh. den. 353 U.S. 931). Hence, the five year statute of limitations expired in 1961, and barred, as a matter of law, petitioner's prosecution on the indictment filed here in 1962. A contrary conclusion "would for all practical purposes wipe out the statute of limitations in conspiracy cases" (*Grunewald* v. *U.S.,* 353 U.S. 391, 402).

A word should be added with respect to this Court's decision in *Pinkerton* v. *United States,* 328 U.S. 640 (1946), which was cited, in passing, in the opinion below (A, p. 3a). Although the *dissenting* opinion in that case alluded to the fact that Daniel Pinkerton, one of the core conspirators, was in prison when some of the overt acts were committed, the record disclosed that he was given passes to leave the prison during his six month term, and that he was involved in the conspiracy after his release from the penitentiary (Record on Appeal, United States Supreme Court, Oct. Term 1945, Transcript of Record, pp. 92-93, 95, 99, 119, 124-31, 132, 155, 162-63). In short, there was ample evidence in the *Pinkerton case* that Daniel's brief and interrupted stay in the State penitentiary did not sever his connection with the conspiracy, and that, in fact, he continued to participate in the conspiracy after his release from prison.

II

The Court of Appeals misconstrued and misapplied the decision in *Hyde* v. *United States*.

As noted below, this Court "last spoke comprehensively on withdrawal from a conspiracy in the opinion of Mr. Justice McKenna for five Justices in *Hyde* v. *United States*, 225 U.S. 347, 369 (1912)—the four dissenters not reaching this issue" (A, p. 20a). In the *Hyde* case, the indictment charged a conspiracy to fraudulently obtain school lands in California and Oregon, to exchange them for federal land, and to sell the federal land received in the exchange. One of the "core" conspirators, Schneider, made a partial disclosure of the conspiracy to the government, and did not thereafter actively participate in the conspiracy during the period of the statute of limitations.*

This Court held that the issue of withdrawal was properly submitted to the jury, since there was evidence from which the jury could find that Schneider deliberately kept silent about certain aspects of the conspiracy in order to protect and further its interests, thereby acquiescing in subsequent overt acts, and " 'might be *playing his part* by keeping still as much as he did formerly by acting' " (225 U.S. at p. 368, emphasis supplied). The opinion stressed the fact that a conspirator who "*has started evil forces* * * * must withdraw his support from them or incur the guilt of their continuance" (225 U.S. at pp. 369-370, emphasis supplied). In his dissent on other grounds, Mr. Justice Holmes assumed "that, so far as the statute of limitations is con-

* As noted by the Court of Appeals, "Schneider's pre-limitation conduct, in procuring false and ficticious applications for school lands and otherwise, resulted in the passage of titles in the General Land Office within the period" (A, p. 21a).

cerned, an overt act done anywhere with the express or implied consent of conspirators would show the conspiracy to be continuing *between the parties so consenting*, and leave them open to prosecution for three years from that date" (225 U.S. at p. 385, emphasis supplied).

The Court of Appeals construed the *Hyde* decision as requiring either a complete confession, or some kind of "communication" to co-conspirators, in order to establish withdrawal from a continuing conspiracy. However, as the Ninth Circuit Court of Appeals correctly pointed out in *Buhler* v. *United States*, 33 F. 2d 382 [1929], in discussing the *Hyde* decision:

> "The court did not attempt to lay down any specific rule defining what would be a sufficient act of withdrawal or what would be competent or sufficient evidence to establish it. The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial, in practice often taking a wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character. It might, of course, be shown by a writing, or by an express oral agreement, and we think *by conduct wholly inconsistent with the theory of continuing adherence.* But the mere failure to perform an overt act in furtherance of the conspiracy, or mere inactivity *not inconsistent with the theory of continuing adherence*, would not of itself necessarily import withdrawal." (Emphasis supplied; see, also, *Marino* v. *United States*, 91 F. 2d 691, 698 [9th Cir., 1937], cert. den. sub nom. *Gullo* v. *U.S.*, 302 U.S. 764, where a portion of the above language is quoted.)

The *Buhler* case involved a conspiracy to defraud by use of the mails, which had a three year statute of limitations,

and the indictment was filed on March 26, 1928. The evidence showed that Buhler had left the locus of the conspiracy on February 14, 1925—44 days more than 3 years prior to the filing of the indictment—and there was no further evidence as to him after that date. In holding that the evidence did not warrant a finding that Buhler continued to participate in the conspiracy after his departure, and hence, that the statute of limitations barred his prosecution, the Court stressed the fact that there was no contention by the government "that appellant devised or participated in devising the scheme in question, or in its inception had anything to do with or knew anything about it" (33 F. 2d at p. 384).

Manifestly, the nature of the conspiracy involved and the roles of the participants therein are critical factors in evaluating the question of withdrawal (*Buhler* v. *United States, supra; Poliafico* v. *United States, supra; United States* v. *Agueci, supra*). In the *Hyde* decision itself, in rejecting the argument that it was taking "the defense of the statute of limitation from conspiracies", this Court noted that its decision allowed the defense "to all, *but makes its application different*" (225 U.S. at p. 369; emphasis supplied). Mr. Justice McKenna's general discussion of the question of withdrawal was geared to the core conspirator, who joined the conspiracy "the moment it was brought into life", who "started evil forces" and "constituted agents for its performance" (225 U.S. at p. 369).

The opinion below misconceives the purport of the *Hyde* decision and squarely conflicts with the *Buhler* case. Particularly, it fails to take into account the distinction between a "core" and "non-core" member of a conspiracy,

which distinction was foreshadowed in the *Hyde* case and applied in the *Buhler* case.

Thus, petitioner was not a member of the "executive group" (17) or "board of directors" (3155-56), who, like Valachi in the *Agueci* case and Riccobene in the *Poliafico* case, initiated the importations and subsequent distributions of the narcotics. His role in this conspiracy was not analogous to that of Schneider in the *Hyde* case, who "started evil forces" and continued to play "his part" in the conspiracy by maintaining a purposeful silence. The government did not contend that petitioner "devised or participated in the devising of the scheme in question, or in its inception had anything to do with or knew anything about it" (*United States* v. *Buhler, supra*). Petitioner was hardly in a position to defeat the purpose of the conspiracy, and any disavowal by him of the purpose of the conspiracy would have been an empty gesture. Since he could not pursue his role in the conspiracy without freedom of movement, his complete inactivity after his arrest and imprisonment was wholly "inconsistent with the theory of continuing adherence" (*United States* v. *Buhler, supra*), and required his acquittal as a matter of law.

III

Petitioner's plea of guilty to the prior indictment constituted a voluntary, affirmative act of withdrawal from the conspiracy charged in this indictment.

As previously noted, the arrest and imprisonment of petitioner necessarily precluded any further participation by him in the role attributed to him in this conspiracy. In addition to this involuntary termination, we have here a

plea of guilty to the prior indictment. By pleading guilty to three felony counts, petitioner, we maintain, "affirmatively disassociated himself from the conspiracy" (*United States* v. *Witt*, 215 F. 2d 580, 584 [2d Cir., 1954], cert. den. sub nom. *Talanker* v. *U.S.*, 348 U.S. 887), voluntarily took himself out of circulation, and necessarily terminated his role in this conspiracy as a receiver of narcotics. Since the manifest and inevitable effect of his plea was a voluntary termination of his dealings with Rinaldo and his confederates, the plea should have been viewed as an affirmative act of withdrawal.

This Court noted in the *Hyde* case that a conspirator who has "started evil forces * * * *must withdraw his support from them* or incur the guilt of their continuance" (225 U.S. at pp. 369-70, emphasis supplied). There could be no greater withdrawal of support by a receiver of narcotics—who joined the "evil forces" well after they had "started"—than to remove himself from the scene and make his further participation impossible. No "communication" by petitioner to the "board of directors" could have more decisively terminated his participation in this conspiracy than his plea of guilty to charges of illegal possession of narcotics and conspiracy to violate the narcotics laws.

In short, the plea of guilty to three felony counts is the most persuasive possible showing of "conduct wholly inconsistent with the theory of continuing adherence" (*Buhler* v. *United States, supra*; *Marino* v. *United States, supra*). Having done "something definite and decisive to disassociate himself" from the conspiracy (*Deacon* v. *United States*, 124 F. 2d 352, 358 [1st Cir., 1941], a posi-

tive act "to disavow or defeat" his continuing participation in this conspiracy, petitioner is in a commanding "situation to claim the delay of the law" (*Hyde* v. *United States, supra,* 225 U.S. at p. 369).

In considering the probative effect to be accorded the plea of guilty, the very real prejudicial effect which the guilty plea had upon petitioner's claim of double jeopardy should not be overlooked. Both indictments charged petitioner, in part, with conspiring with persons "to the Grand Jury unknown" to violate Sections 173 and 174 of Title 21 of the United States Code. Here, as in *Short* v. *United States,* 91 F. 2d 614, 620 [4th Cir., 1937], "because of the generality of the language used it is * * * impossible to say upon the face of the indictments that they do not relate to the same conspiracy." Had he pleaded not guilty to the prior indictment and compelled the making of a record, petitioner would have been in a position to factually demonstrate that the "effect" of the prior indictment "was merely to carve a smaller conspiracy, in point of number of defendants and period of time involved, out of the larger conspiracy now under consideration." (*United States* v. *Cohen,* 197 F. 2d 26, 29 [3rd Cir., 1952]). Having pleaded guilty, however, he could not show that the two conspiracies were the same without taking the witness stand, with all its incalculable risks. The government had placed petitioner in the position of having to forego one constitutional right, the right to remain silent, in order to establish the deprivation of another constitutional right, the right to be immune from multiple jeopardy. The fair administration of criminal justice cannot be served by permitting such ironic prejudice to flow from a plea of guilty.

IV

The government failed to prove that the conspiratorial agreement made by petitioner continued into the limitation period.

The trial court correctly charged the jury that it was incumbent upon the government to "prove as to each defendant beyond a reasonable doubt that he was a member of the conspiracy after August 15, 1957" (3223), the cut-off date of the statute of limitations. The Court of Appeals sought to justify its rejection of petitioner's claim of withdrawal as a matter of law by reasoning that before the issue of withdrawal "is reached," the government is obliged to "present evidence justifying the jury in finding beyond a reasonable doubt that the particular agreement into which a defendant entered continued into the period not barred by limitation" (A, p. 13a). Since the statute of limitations would begin to run in favor of a member of the conspiracy "when his own agreement terminates", it was "neither unfair nor unreasonable to require affirmative demonstration that he was abrogating it at an earlier date" (A, p. 22a).

Upon analysis of the opinion below, it is evident that the seeming increased burden placed upon the Government is more apparent than real; and that the opinion of the Court of Appeals begs the important questions heretofore discussed in this petition.

Even were we to view this case in the posture assumed by the Court of Appeals (without, of course, conceding the propriety of that posture), it is respectfully submitted that the only conceivable agreement attributable to petitioner was to "purchase" narcotics from the "core" while he was

free to do so. The Government itself characterized petitioner as a "wholesale receiver", and no one can agree to wholesale unless he is in a position to deliver to the retailer.

Moreover, if, as reasoned below, the scope of petitioner's agreement "must be determined individually from what was proved as to him" (A, p. 13a), the efforts to dispose of the bad Italian heroin cannot possibly serve to carry petitioner's agreement into the limitation period. The impure heroin was imported from Italy in the spring and summer of 1955 (173a-238a; A, p. 5a). After December of the previous year, Rinaldo made only two deliveries to petitioner, in September and October of 1955. It is perfectly clear from the record that both these deliveries were of pure, not impure, heroin. Thereafter, petitioner was arrested and indicted in February of 1956, and imprisoned in May of 1956. It was in the latter month, May of 1956, that the 42 kilograms of bad heroin were divided between Locascio and Joseph Mogavero (239a-241a; A, p. 5a). Thus, the efforts to dispose of the impure heroin *did not even begin* until after petitioner had been apprehended and imprisoned. How, then, we ask, can the criminal agreement into which petitioner entered be even remotely connected to the attempts to dispose of the bad Italian heroin?

In any event, even were the evidence sufficient to infer an initial agreement on petitioner's part to aid in the disposal of all the heroin imported from Italy, his incarceration terminated that agreement as completely as his death would have terminated it. Freedom of movement was necessarily an implied condition of any agreement attributable to petitioner, since it was the *sine qua non* of his participation in the conspiracy. The physical restraint and removal attendant upon his imprisonment completely frustrated his

agreement to act as a "wholesale receiver", and rendered it impossible of performance. Since it was the federal government itself that caused the termination of the agreement made by petitioner, it should not be heard to say that the agreement survived his incarceration.

CONCLUSION

The effect of the imprisonment of a fringe member, or outer link, of a continuing conspiracy upon the government's burden of proof and the defendant's burden of establishing a withdrawal are questions of first impression, vitally affecting the administration of justice in the federal courts. Fifty-two years have elapsed since this Court last spoke comprehensively on the issue of withdrawal from a conspiracy in *Hyde* v. *United States, supra.* The lower court's interpretation of the *Hyde* decision conflicts with that of the Ninth Circuit Court of Appeals in *Buhler* v. *United States, supra,* and compels petitioner to expose to the jury his prior imprisonment on charges of narcotics trafficking. The treatment below of the statute of limitations fails to heed the caveat of this Court against "broaden-[ing] the already pervasive and wide-sweeping nets of conspiracy prosecutions" (*Grunewald* v. *United States, supra,* 353 U.S. at p. 404).

The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 478—September Term, 1963.

(Argued June 11, 1964 . Decided July 31, 1964.)

Docket No. 28721

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK BORELLI, DOMINICK CASTIGLIA, BENEDETTO CINQUEGRANO, THOMAS GARIBALDI, CARMINE LOCASCIO, ANGELO LOIACANO, ROSARIO MOGAVERO, MIKE SEDOTTO, DAVID "POP" SMITH, ROCCO SANCINELLA and HARRY TANTILLO,

Appellants.

Before:

FRIENDLY, SMITH and MARSHALL,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*, convicting appellants of a conspiracy to violate the narcotics laws, 21 U. S. C. §§173-174, after a jury trial. Reversed for retrial.

MANUEL KATZ (Paul T. Smith on brief), Boston, Mass., *for Appellant Frank Borelli.*

JEROME J. LONDIN, New York, N. Y., *for Appellant Michael Sedotto.*

ERNST H. ROSENBERGER (Eve M. Preminger on brief), New York, N. Y., *for Appellant Angelo Loiacano.*

JACOB W. HELLER (Heller & Dretzin), New York, N. Y. (Moses L. Kove and Eugene L. Wishod, of Counsel), *for Appellant Benedetto Cinquegrano.*

HARVEY P. DALE (Anthony F. Marra, New York, N. Y.), *for Appellant Rocco Sancinella.*

JEROME LEWIS, Brooklyn, N. Y., *for Appellants David Smith, Thomas Garibaldi and Dominick Castiglia.*

ALFRED DONATI, JR., New York, N. Y., *for Appellant Rosario Mogavero.*

ALBERT J. KRIEGER, New York, N. Y., *for Appellants Carmine Locascio and Harry Tantillo.*

PETER FLEMING, JR. (Robert M. Morgenthau, United States Attorney for the Southern District of New York; Charles A. Stillman, Robert J. Geniesse, Martin Gold, Edward M. Shaw and John Bartels, Assistant United States Attorneys, of Counsel), *for the United States of America.*

FRIENDLY, *Circuit Judge*:

Appellants from conspiracy convictions too often remind us of *Kotteakos* v. *United States*, 328 U. S. 750 (1946), and of Mr. Justice Jackson's concurrence in *Krulewitch* v. *United States*, 336 U. S. 440, 445 (1949), in instances where

the reminder is inapposite. But a few facts will show in what degree the instant case gives point to Mr. Justice Jackson's description of conspiracy as "that elastic, sprawling and pervasive offense," whose development exemplifies, in Judge Cardozo's phrase, the "tendency of a principle to expand itself to the limit of its logic"—and perhaps beyond.

This indictment was filed August 15, 1962. The applicable statute of limitations is five years, 18 U. S. C. §3282. The conspiracy is alleged to have begun in 1950 and to have lasted until 1959. The only acts of participation proved as to one appellant were in 1951. As to others there was no evidence of participation later than 1955. Two who first appear in 1958 were found to have been in "partnership in crime," *Pinkerton* v. *United States,* 328 U. S. 640, 644 (1946), with those who, so far as the proof shows, left the stage seven and three years before. Tacitly recognizing inclusion of all the appellants in a single conspiracy to be something of a *tour de force,* the Government contends in its able brief and argument that the convictions are buttressed by impressive authority and impeccable logic. The conspiracy, it says, was continuous as regards at least some of the principals; each participant is presumed to have been responsible for all that would ever go on, or that ever had; and he could terminate this responsibility only by making a clean breast to the authorities or by informing his colleagues—mostly unknown to him—that he was through. The appeal thus demands an examination of the application of the law of conspiracy to the long continued conduct of an illicit business. We have concluded that the case required a more carefully defined submission to the

jury than the Government sought and obtained. For this and other reasons discussed below we reverse the convictions and direct a new trial.

I. *The Government's Evidence*

The burden of the Government's case was borne by Salvatore Rinaldo, also its principal witness in *United States* v. *Agueci*, 310 F. 2d 817 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963). His testimony can be summarized as follows, postponing a few matters that will be mentioned where appropriate, and eliminating many details which are not here essential as they relate primarily to members of the conspiracy not involved in this appeal.

In the summer of 1950, Rinaldo met with Rosario and Joe Mogavero and Carmine Locascio, who wished him to travel to Italy to bring back "some junk." The trip was made around the turn of the year; Rinaldo paid $50,000 for the heroin. Rosario and Locascio then hired him to make deliveries, at a fee of $100 per package. Upon instructions from Rosario or Locascio, Rinaldo would pick up heroin at the "plant"—initially a machine shop, later Joe's home—and would make deliveries, typically of two or three kilos, to various wholesalers, including Tantillo, Cinquegrano and Borelli, who made their payments without using the agency of Rinaldo. This activity continued for some time with minor variations not here material. In December, 1953, Rosario began serving an eight-year New York state sentence for extortion. At a farewell meeting he said that "in the future I [Rinaldo] was to take orders from Joe Mogavero and Carmine Locascio, and to act just like I had acted before; just that I would be taking orders from

Joe Mogavero, but they would be just like coming from him."

Business continued much as theretofore. In June, 1954, Locascio introduced Rinaldo to one Jimmy Jerome, who later presented his runner, Mike Sedotto; Rinaldo began making deliveries to Sedotto. Another 1954 development was the deportation of Salvatore Caneba, the local representative of the Italian source of supply. In August, 1954, Locascio and Joe Mogavero introduced Rinaldo to a new connection, appellant David "Pop" Smith, from whom Rinaldo made large pick-ups, followed by deliveries, *inter alia,* to Borelli, Cinquegrano and Sedotto. The next year, 1955, saw the reestablishment of the Italian source of supply, although Smith also continued to be a provider.

Some of the heroin imported from Italy in the spring of 1955 proved to be impure; it would not dissolve or go through a needle. Sedotto returned a lot that he had picked up for Jerome. A second delivery from Italy in August 1955 was again a mixed batch—some of the heroin was pure, some not. Joe Mogavero and Locascio continued operations with the pure Italian heroin and with supplies obtained from Smith, but 42 kilograms of bad heroin became an albatross around the business' neck. Rinaldo made a trip to Italy to pay the Canebas a reduced price for the impure heroin. Their contention that they were entitled to $50,000 more than Rinaldo's principals were willing to pay led them to insist that any future dealings must be on a cash on delivery basis.

On Locascio's instructions, confirmed by Joe Mogavero, Rinaldo gave the former 20 kilograms of the impure heroin in May, 1956; Joe and Locascio had agreed to "try to get

rid of the stuff separately . . . It was too much, anyway, to be keeping in one place." In the ensuing months Joe and Rinaldo labored mightily to purify the 22 kilos of impure heroin which Joe had kept. In June or July, 1957, Joe told Rinaldo he had spent between $100,000 and $150,000 of Rosario's money and wanted to get moving again. In September or October, he explained that he was negotiating with appellant Loiacano for the sale of the 22 kilos; he later confided that Rosario had instructed him not to be sticky about the price. In December, 1957, Joe introduced Rinaldo to Loiacano and the latter's runner, appellant Sancinella, and instructed that deliveries of the impure heroin were to be made to the latter. Rinaldo made about seven such deliveries, the last in March, 1958.

The next chapter began shortly thereafter. Around April, 1958, Joe Mogavero and Loiacano, now risen to partnership rank, told Rinaldo they would have to get a new source of supply; the contact was to be Charles Di Palermo, a name frequently encountered in cases of this sort, but the place of delivery was uncertain. About May or June, Rinaldo was introduced to appellant Garibaldi whom Joe and Loiacano presented as the "fellow who would pick up the goods that I was getting." In July, Rinaldo was told to go to Miami to take delivery of heroin that was being brought in by ship. Di Palermo was there and sold him seven kilos. Rinaldo returned to New York and delivered these to Garibaldi against payment of $35,000 in small bills, which he took to Joe and Loiacano. Later Rinaldo made pick-ups from a new source of supply, Freddy Eppolito; these also he delivered to Garibaldi. In September, while making

further deliveries, Rinaldo complained to Garibaldi about receiving payment in small bills; the latter replied "that was the way he was getting the money from Borelli, and that's the way he was going to give it . . ." to Rinaldo. He also volunteered that it was he who had purchased Locascio's share of the impure heroin.

The last appellant to appear is Castiglia. Described as "Mickey Blair", he was introduced by Joe Mogavero to Rinaldo in November, 1958, as one who in turn would introduce a future deliverer of heroin. On several occasions between December, 1958 and March, 1959, through Castiglia's intercession, Rinaldo took deliveries from one Ralph; he in turn delivered to Garibaldi or Castiglia. The relationship between Rinaldo and his associates terminated in March, 1959, in a quarrel about money. Rinaldo thought he was to be a partner in the operations begun in 1958. Joe repudiated the suggestion, saying he had "spent all the cash that belonged to his brother, Saro, and the only way he could get even is if I [Rinaldo] wanted to work at $200 a kilo . . ." On Rinaldo's questioning whether this harsh attitude to him had Rosario's sanction, Joe said he had talked to Rosario "about this, and his brother gave him the okay to do anything he wanted."

Although the Government supported Rinaldo's testimony with evidence confirming his comings and goings and showing the existence of a secret closet in Joe Mogavero's apartment, the only other directly inculpatory evidence was the testimony of Sierra, relating to Sedotto, and of Ager, relating to Smith. Sierra, who had been in prison since 1957 on a federal narcotics conviction, testified to purchases of heroin in 1955 and early 1956 from Jimmy Jerome, with

the deliveries being made by Sedotto. Some of this heroin was impure; consequent unpleasantness led to an interruption of contacts. These were renewed in July and August, 1956, and then again in December, 1956, and Sedotto engaged in several of them. The coincidence of dates and the impurity of part of the heroin afforded some basis for concluding that these deliveries were of heroin emanating from Joe Mogavero or Locascio. Ager, under indictment for a federal narcotics offense, testified that in May or June, 1954, at his father's instance, he received a "16 unit" suitcase from Charles Bourbonnais which he delivered to Smith, who later gave him bags of money. This process was frequently repeated through 1955 and 1956, with Smith making numerous payments of about $40,000 at the rate of $5,000 per unit. Late in 1956, Smith complained of the quality. This led to a gap, but there was another delivery in mid-1957, the last payment for which was made in February, 1958. Ager's deliveries to Smith synchronized with Smith's deliveries to Rinaldo, although apparently they were larger in amount and continued longer. The deliveries Rinaldo received of Smith were generally of sixteen kilograms.

II. *"Single" Conspiracy*

The indictment alleged a single conspiracy, and the court instructed the jury that if it found "that the government has failed to prove the existence of one conspiracy, you must find the defendants not guilty" and that "proof of several separate and independent conspiracies involving various of the defendants . . . is not proof of the single

conspiracy charged . . ." Appellants contend that the evidence showed several conspiracies and, in the alternative, that the judge's failure to furnish the jury with an intelligible criterion for determining the issue of the one versus the many constituted "plain error" correctible under F. R. Crim. Proc. 52(b).[1] The Government responds that the evidence warranted the jury's finding a single "chain" conspiracy as in *United States* v. *Bruno*, 105 F. 2d 921 (2 Cir.), rev'd on other grounds, 308 U. S. 287 (1939); *United States* v. *Rich*, 262 F. 2d 415 (2 Cir. 1959); *United States* v. *Stromberg*, 268 F. 2d 256 (2 Cir.), cert. denied, 361 U. S. 863 (1959); *United States* v. *Agueci, supra;* and *United States* v. *Bentvena*, 319 F. 2d 916 (2 Cir.), cert. denied, 375 U. S. 940 (1963); and that the instruction was sufficient, at least in the absence of a request containing a better one or a pertinent exception. In this case whether there was a single or several conspiracies was extraordinarily significant because, in addition to the questions with respect to the admission of declarations that are often presented, the

[1] The charge on the subject was as follows:

"In determining whether there was a single conspiracy, you may consider what the evidence shows as to changes of personnel and activity, but you may find a single conspiracy even though there were changes in personnel and activities, provided that you find that some of the conspirators continued throughout the life of the conspiracy and that the purposes of the conspiracy continued to be those charged in the indictment.

"But, on the other hand, if you find that one conspiracy terminated and another one was formed you may not find a single conspiracy, even though the purposes of both conspiracies were the same and that some of the defendants were members of both."

The judge had previously charged:

"Now, a conspiracy once formed, ladies and gentlemen, is presumed to continue as to each alleged participant until either its object has been accomplished or there has been some affirmative act by that participant of termination or withdrawal."

issue bore importantly on the problem of the statute of limitations. Cf. *Berger* v. *United States*, 295 U. S. 78, 81-83 (1935); *Blumenthal* v. *United States*, 332 U.S. 539, 559-60 (1947); *United States* v. *Agueci, supra*, 310 F. 2d at 827-28.

As applied to the long term operation of an illegal business, the common pictorial distinction between "chain" and "spoke" conspiracies can obscure as much as it clarifies. The chain metaphor is indeed apt in that the links of a narcotics conspiracy are inextricably related to one another, from grower, through exporter and importer, to wholesaler, middleman, and retailer, each depending for his own success on the performance of all the others. But this simple picture tends to obscure that the links at either end are likely to consist of a number of persons who may have no reason to know that others are performing a role similar to theirs—in other words the extreme links of a chain conspiracy may have elements of the spoke conspiracy.[2] More-

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[2] Thus, in the oft-cited *Bruno case*, although it is clear enough that "*quoad* the smugglers, there was but one conspiracy, for it was of no moment to them whether the middlemen sold to one or more groups of retailers, provided they had a market somewhere," 105 F. 2d at 923, it is not so clear why the New York and Texas groups of retailers were not in a "spoke" relation with the smugglers and the middleman, so that there would be two conspiracies unless the evidence permitted the inference that each group of retailers must have known the operation to be so large as to require the other as an outlet. Cf. *United States* v. *Stromberg, supra*, 268 F. 2d at 264, and see Wechsler, Jones and Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the A. L. I.: Attempt, Solicitation, and Conspiracy, Part II, 61 Colum. L. Rev. 957, 981-84, 994 (1961); The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276 (1948); Federal Treatment of Multiple Conspiracies, 57 Colum. L. Rev. 387 (1957). Whether such a variance would cause any prejudice is a wholly different matter.

over, whatever the value of the chain concept where the problem is to trace a single operation from the start through its various phases to its successful conclusion, it becomes confusing when, over a long period of time, certain links continue to play the same role but with new counterparts, as where importers who regard their partnership as a single continuing one, having successfully distributed one cargo through X distributing organization, turn, years later, to moving another cargo obtained from a different source through Y. Thus, however reasonable the so-called presumption of continuity may be as to all the participants of a conspiracy which intends a single act, such as the robbing of a bank, or even as to the core of a conspiracy to import and resell narcotics, its force is diminished as to the outer links—buyers indifferent to their sources of supply and turning from one source to another, and suppliers equally indifferent to the identity of their customers.

The basic difficulty arises in applying the seventeenth century notion of conspiracy, where the gravamen of the offense was the making of an *agreement* to commit a readily identifiable crime or series of crimes, such as murder or robbery, see Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 922, 923 (1959), to what in substance is the conduct of an illegal business over a period of years. There has been a tendency in such cases "to deal with the crime of conspiracy as though it were a group [of men] rather than an act" of agreement. See 72 Harv. L. Rev. at 934. Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of

agreement or understanding existed as to each defendant. It is a great deal harder to tell just *what* agreement can reasonably be inferred from the purchase, even the repeated purchase, of contraband, than from the furnishing of dynamite to prospective bank robbers or the exchange of worthless property for securities to be subsequently distributed. Purchase or sale of contraband may, of course, warrant the inference of an agreement going well beyond the particular transaction. A seller of narcotics in bulk surely knows that the purchasers will undertake to resell the goods over an uncertain period of time, and the circumstances may also warrant the inference that a supplier or a purchaser indicated a willingness to repeat. But a sale or a purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction.

The view that if the evidence warrants the finding that some defendants were parties to a single agreement to sell contraband for a nine-year period, it necessarily does so as to every defendant who has conspired with them at any time for any purpose, is thus a considerable over-simplification. Rinaldo's testimony thoroughly warranted the finding of an agreement among himself, Joe and Rosario Mogavero beginning in 1950 and continuing through 1959. But it does not follow, for example, that his recital of two deliveries to Tantillo in March and July, 1951, on the instructions of Locascio in one instance, and of Rosario Mogavero in the other, would justify a finding that Tantillo had thereby made himself a part of whatever narcotics enterprises

Locascio, the Mogaveros and their future partners might engage in for the rest of their lives, provided only that these were uninterrupted—a theorem that would lead to the inevitable but extraordinary conclusion that Tantillo's two purchases entered him into a "partnership in criminal purposes," *United States* v. *Kissel*, 218 U. S. 601, 608 (1910), with Castiglia, who supplied a source to and took deliveries from an altered core seven years later, and *vice versa*.[3] We agree with the Government that the evidence links Tantillo with central figures in the conspiracy sufficiently to render inapplicable our decisions in *United States* v. *Koch*, 113 F. 2d 982 (1940) or in *United States* v. *Stromberg*, *supra*, 268 F. 2d at 267 [as to Snyder]. For reasons later stated, we agree also that Tantillo did not make out the affirmative defense of withdrawal as a matter of law. But before that issue is reached, the Government must present evidence justifying the jury in finding beyond a reasonable doubt that the particular agreement into which a defendant entered continued into the period not barred by limitation, *Grunewald* v. *United States*, 353 U. S. 391, 397 (1957), and the scope of his agreement must be determined individually from what was proved as to him. If, in Judge Learned Hand's well-known phrase, in order for a man to be held for joning others in a conspiracy, he "must in some sense promote their venture himself, make it his own," *United*

[3] The Government relies also on a chance meeting between Rinaldo and Tantillo in 1960, where, after some casual conversation, "Tantillo told me that he was sorry that he had to stop picking up from me; that although he was paying 11,000 a kilo for it, there was plenty of margin for him." The inference from this is not at all helpful to the Government, it shows that Tantillo, far from being indissolubly linked with the central core, was willingly buying from someone else.

States v. *Falcone*, 109 F. 2d 579, 581 (2 Cir.), aff'd, 311 U. S. 205 (1940), it becomes essential to determine just what he is promoting and making "his own."

The utmost time bounds of any conspiracy proved as to Tantillo was the liquidation of the partnership between the Mogavero brothers and Locascio by the disposal of the last of the impure heroin imported from the Caneba source in Italy; we see nothing in the mere fact of his purchases that would warrant an inference that he agreed to participate in the activity, begun nearly seven years later, in which Loiacano replaced Locascio as partner of one or both of the Mogaveros, and which depended on wholly new sources of supply. It is indecisive on this issue that there was no substantial time gap between the two phases of the venture and that the jury might permissibly consider there to have been a single continuing agreement as regards the Mogaveros, Loiacano and Rinaldo; the change in operations was sufficient to spend any force remaining in the inference of agreement arising from Tantillo's purchases of long ago. Compare, in a different but relevant context, *Maggio* v. *Zeitz*, 333 U. S. 56, 66 (1948).

Tantillo was thus entitled to an instruction which would make his conviction depend on the jury's accepting Rinaldo's testimony that Joe Mogavero's share of the impure heroin divided by the partnership was not sold until after August 15, 1957. The jury's attention should then have been focused on the extent of the agreement attributable to Tantillo on the basis of his two purchases. Specifically, the jury should have been asked to decide whether the evidence showed that Tantillo was associating himself with the continuing enterprise of importations from Italy being

conducted by the Mogavero brothers and Locascio, carrying through the final disposition of the impure heroin, or only with a plot to move what had already been imported. "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it." *United States* v. *Peoni*, 100 F. 2d 401, 403 (2 Cir. 1938). Although this may further complicate the already complex charge in a narcotics conspiracy trial, a requirement necessary to protect a defendant from over-exertion of a legal doctrine may not be dispensed with simply because it some what lessens the attractiveness of prosecuting for conspiracy rather than for substantive crimes. By no means every conspiracy trial will raise the problem here considered. Often the defendant's act will not have the ambiguity with respect to the inference of agreement that is inherent in the mere purchase, transportation or sale of contraband; even in cases where some ambiguity exists, the precise scope of his agreement would not always be sufficiently important that the judge would be required to stress it in his charge; here, because of the problem of limitations, it could be critical.[4]

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[4] We realize that in a case not involving a time bar, the scope of a defendant's agreement is often pertinent to the admissibility of implicating declarations by alleged co-conspirators and to the relevance of evidence of their acts. However, many, perhaps most, declarations concerning a defendant who was no longer participating in the conspiracy would be barred in any event by the requirement that these be in furtherance of the conspiracy and not be merely narrative. *Van Riper* v. *United States*, 13 F. 2d 961, 967 (2 Cir.), denied *sub nom. Ackerson* v. *United States*, 273 U. S. 702 (1926); *United States* v. *Goodman*, 129 F. 2d 1009, 1013 (2 Cir. 1942); *United States* v. *Annunziato*, 293 F. 2d 373, 380

What we have written with respect to Tantillo[5] applies, *mutatis mutandis*, to Locascio, Cinquegrano, Sedotto, Smith and Sancinella;[6] although these may have played more important roles than Tantillo—indeed in Locascio's case it is plain, if Rinaldo's testimony is believed, that his activity was central—we see no evidence that would warrant a jury in finding that they became parties to the activity that be-

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Footnote 4—continued:

(2 Cir.), cert denied, 368 U. S. 919 (1961); to the extent they would not be, a defendant is entitled to the protection we have outlined. As to the relevance of evidence of acts of alleged co-conspirators outside the scope of a particular defendant's agreement, a general instruction will suffice, and we doubt that this will either be confusing to the jury or be nugatory—as witness the acquittal of five defendants here. In cases like this the existence of a conspiracy is not usually in serious question; the controverted issues are the various defendants' connections with it. The court always charges that this must be determined on an individual basis; we hold only that where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all-or-nothing basis as to all defendants.

[5] Tantillo complains also that he was sentenced to 10 years for the offense of conspiracy added to 21 U. S. §174 by the Act of November 2, 1951, 65 Stat. 767. Before that, 18 U. S. C. §371, had made it a crime to conspire to violate 21 U. S. C. §§173-74, but the maximum imprisonment was five years. Unless the jury finds that Tantillo entered into and remained in a conspiracy continuing beyond November 2, 1951 to August 15, 1957, the statute of limitations will bar any punishment; if it does find that, the increased punishment is not *ex post facto*. *United States* v. *Markman*, 193 F. 2d 574 (2 Cir.), cert. denied *sub nom. Livolsi* v. *United States*, 343 U. S. 979 (1952).

[6] Sancinella's case illustrates how the determination of the scope of the agreement will often be relatively inconsequential. Even if his only agreement was to aid in the disposal of the impure heroin, this continued into the period not barred by limitations and the proof against him was Rinaldo's testimony as to his acts, not declarations of other persons about them.

gan in April, 1958. Although the evidence implicating Loiacano both in the earlier and in the later phase was such that we might well consider any error on the single conspiracy issue to have been harmless with respect to him, see *United States* v. *Cohen*, 145 F. 2d 82, 88-89 (2 Cir. 1944), cert. denied, 323 U. S. 799, 800 (1945); *United States* v. *Benjamin*, 328 F. 2d 854, 864 (2 Cir.), cert. denied, —— U. S. —— (1964), it would be best to have the jury determine whether he became a party to both phases, since if it were not convinced of his participation in the second, any finding of guilt on the first must hinge, as it should be told, on accepting Rinaldo's testimony as to the continuation of the efforts to dispose of the bad heroin beyond August 15, 1957. Garibaldi's acts related to the second phase but his admission that he was the purchaser of Locascio's share of the bad heroin would permit a finding that he was also a party to the first; the instructions as to him should parallel those as to Loiacano. As to Rosario the evidence sufficed to show participation in a single continuing conspiracy with his brother Joe and Rinaldo; his position as banker and his farewell address were sufficient evidence of his continuing participation to render admissible his brother's statement further implicating him in the second phase. There was no evidence connecting Castiglia with the activities prior to the resort to new sources of supply in April, 1958; the jury should have been instructed to disregard all evidence of these in determining his guilt.

This leaves Borelli. The only evidence expressly connecting him with the later phase consists of Garibaldi's declaration in September, 1958, that Borelli was then dealing with him; this was admissible against Borelli only if

other evidence permitted the inference that he had associated himself with the continuing venture. See *United States* v. *Reina*, 242 F. 2d 302 (2 Cir.), cert. denied *sub nom. Moccio* v. *United States*, 354 U. S. 913 (1957). Borelli had been one of the first purchasers, in May, 1951. From that time until late in 1955, deliveries to him were so frequent and so large as to suggest strongly that he was a continuing customer on whom Joe Mogavero could rely during the second phase of the conspiracy in which Garibaldi was a prominent figure. Although such evidence, standing alone, might not have sufficed to warrant submitting Borelli's participation in the second phase of the activity to the jury, the judge could properly deem it enough to meet the threshold requirement of showing the likelihood of an association between Borelli and Garibaldi and thus to render admissible the latter's statement confirming the association; with this added, the evidence of Borelli's participation in both phases of the conspiracy was sufficient for persuasion beyond a reasonable doubt. Cf. *United States* v. *Pugliese*, 153 F. 2d 497, 500 (2 Cir. 1945); *United States* v. *Dennis*, 183 F. 2d 201, 230-31 (2 Cir. 1950), aff'd 341 U. S. 494 (1951); *Carbo* v. *United States*, 314 F. 2d 718, 735-38 (8 Cir. 1963), cert. denied, June 2, 1964; McCormick, Evidence, §53 (1954); Maguire and Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392, 415-18 (1927); Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165, 169, 175, 188 (1929). Like Loiacano and Garibaldi, Borelli was entitled to an instruction that if the jury found the evidence insufficient to link him with the second phase, his liability to conviction de-

pended on whether the efforts to dispose of the bad Italian heroin lasted beyond August 15, 1957.

We add a word why our conclusion on the single conspiracy issue does not require us to direct that any of the defendants be acquitted or even that on a retrial the Government elect between the first and the second phase of the conspiracy, as in *United States* v. *Russano*, 257 F. 2d 712, 716 (2 Cir. 1958). In contrast to that case, the Government's evidence here was sufficient to permit a finding of a single continuing conspiracy by several defendants, Rosario Mogavero, Loiacano, Borelli and Garibaldi, along with Joe Mogavero and Rinaldo. It sufficed also to show that Locascio, Tantillo, Cinquegrano, Sedotto, Smith and Sancinella had joined with them in one phase of their criminal enterprise and Castiglia in another. This met the joinder requirements of F. R. Crim. Proc. 8, cf. A. L. I. Model Penal Code, §5.03(4); such variance as there was from the indictment required only the giving of appropriate instructions. See *Berger* v. *United States*, 295 U. S. 78, 82-83 (1935); *United States* v. *Cohen*, *supra*, 145 F. 2d 82, 88-89; *United States* v. *Agueci*, *supra*, 310 F. 2d at 827-28.[7] The case thus is one of trial error, not of misjoinder or of failure of proof.

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[7] Our view that each defendant can be held only for an agreement reasonably inferable as to him reinforces the Government's already sufficient answer to Loiacano's claim that his conviction in *United States* v. *Bentvena*, 319 F. 2d 916 (2 Cir.), cert. denied, 375 U. S. 940 (1963), clothes him with the defense of double jeopardy. See *United States* v. *Aviles*, 274 F. 2d 179, 193 (2 Cir.), cert. denied, 362 U. S. 974, 982 (1960), further proceedings remained on other grounds, 375 U. S. 32 (1963).

III. *Withdrawal*

Seven appellants, Tantillo, Sedotto, Borelli, Smith, Locascio, Rosario Mogavero, and Cinquegrano, contend that the evidence established as a matter of law that they withdrew from the conspiracy before August 15, 1957. The contentions of the first four rest primarily on the alleged absence of evidence of activity on their part after times prior to the cut-off date. Locascio relies on such absence of evidence and also on Rinaldo's testimony as to his split with the Mogaveros. The last two rely heavily on their incarceration—Rosario's, resulting from a state extortion conviction, beginning late in 1953, Cinquegrano's, for an unrelated federal narcotics offense, starting early in 1956, and both continuing beyond the critical date.

The Supreme Court last spoke comprehensively on withdrawal from a conspiracy in the opinion of Mr. Justice McKenna for five Justices in *Hyde* v. *United States*, 225 U. S. 347, 369 (1912)—the four dissenters not reaching this issue. It laid down rigorous requirements for making out the defense of withdrawal from a conspiracy "having continuity of purpose and which contemplated the performance of acts through a series of years. . . . Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law." Mere cessation of activity is not enough to start the running of the statute; there must also be affirmative action, either the making of a clean breast to the authorities, cf. *Fiswick* v. *United States*, 329 U. S. 211, 217 (1946), or com-

munication of the abandonment in a manner reasonably calculated to reach co-conspirators. And the burden of establishing withdrawal lies on the defendant. See 72 Harv. L. Rev. at 958; Wechsler, Jones and Korn, *supra*, 61 Colum. L. Rev. at 1015-17; *United States* v. *Cohen*, *supra*, 145 F. 2d at 90; *United States* v. *Compagna*, 146 F. 2d 524, 527 (2 Cir. 1944), cert. denied, 324 U. S. 867-68 (1945); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 573 (2 Cir. 1961).

It is argued that however well founded the *Hyde* rule was on its facts, where, as the Government urged in its brief to the Supreme Court [pp. 75 ff.], the defendant Schneider's pre-limitation conduct, in procuring false and fictitious applications for school lands and otherwise, resulted in the passage of titles in the General Land Office within the period,[8] the requirement of showing affirmative action is too severe for cases where a defendant simply engaged in the supply, transportation, or purchase of contraband before the period of limitations and the only effects realistically continuing into the period were the profits the central core had realized and its hope of further assistance. We should be obliged to give most serious consideration to this argument if, as urged by the Government, mere proof of past dealings with the core sufficed to permit a jury to infer an agreement to participate in its continuing activities to the end of time. However, our conclusion, explained

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[8] As was persuasively said in the Solicitor General's brief (p. 79), "When conspirators have set a dynamite machine with a timed fuse in position to blow up a building and go away and leave it to do its destructive work in due course of time, they are continuing in their purpose and are in the actual execution of that purpose every moment of time until the machine explodes."

above, that so broad an inference is not allowable, deprives the argument of a good deal of its force. Since each defendant can be held only for that part of the conspiracy which he understood and assented to, and since the statute will begin to run for him when his own agreement terminates, it is neither unfair nor unreasonable to require affirmative demonstration that he was abrogating it at an earlier date. We note that the A. L. I. Model Penal Code, which requires separate determination of the scope of the agreement made by each defendant, preserves substantially the traditional test as to withdrawal. See §5.03(1), (2) and (7), especially (7)(c); Tent. Draft No. 10, pp. 104, 117-26, 153-55 (May, 1962); Wechsler, Jones and Korn, *supra*, 61 Colum. L. Rev. at 979-94, 1015-17. We thus overrule the contentions of Tantillo, Sedotto, Borelli and Smith, that they were entitled to acquittal, on the basis of withdrawal, as a matter of law. Indeed, so far as concerns the last three, we fail to see how the evidence raised any jury issue on withdrawal as a matter of fact; even if the rigors of the *Hyde* rule were to be somewhat relaxed, mere failure by the Government to prove that activity by a particular conspirator continued into the period of limitations would not inevitably require the court to have the jury consider the defense of withdrawal.[9] Tantillo's case is different; his later statement to Rinaldo, see fn. 3, which the Government placed in evidence, combined with the fact that only two

[9] In fact there was such evidence as to Borelli, as we have held. The Government contends that Ager's testimony as to deliveries to Smith in mid-1957 and payments in 1958 showed activity by him within the statutory period, but we do not think these were sufficiently connected with the conspiracy so that evidence concerning them was admissible.

instances of contact were shown, these occurring six years before the beginning of the statutory period, raised an issue for the jury whether he had not sufficiently mainifested an intention to withdraw.

The evidence as to Locascio's split with the Mogaveros in 1956, although sufficient to present a jury issue as to withdrawal, was far from requiring acquittal as a matter of law. Rinaldo gave testimony as to activity by Locascio early in 1957, noted in the final paragraph of this opinion, which the jury would have had to consider on this issue. Moreover, a finding that Locascio terminated all relations with his associates in 1956 would not demand an acquittal. We see no flaw in the Government's argument that such a dissolution of the 1950 partnership would not constitute an effective withdrawal so long as any of the contraband obtained during his participation was being sold. We do not have to go so far as *Eldredge* v. *United States*, 62 F. 2d 449 (10 Cir. 1932), to reach that conclusion. The sale of all the heroin—the Mogaveros' share as well as Locascio's—was the very object of the conspiracy; mere bifurcation of the routes of disposal for the conspirators' mutual convenience does not bring the activity to an end for any of them. Locascio could therefore be convicted if the jury accepted Rinaldo's testimony that the Mogavero share was not liquidated until after August 15, 1957.

Turning to the two defendants who were incarcerated, we speedily dismiss Rosario Mogavero's claim to acquittal. Neither authority nor reason would suggest that imprisonment necessarily shows a withdrawal; indeed, we have recently held squarely to the contrary, *United States* v. *Agueci*, *supra*, 310 F. 2d at 838-39. Although the evidence

of Rosario's continued participation after his incarceration was less strong than as to Valachi's in *Agueci*, it was strong enough for the jury to find that, far from withdrawing, he continued to be a significant member of the conspiracy.

Cinquegrano cites a number of opinions with passages suggesting that although confinement of a defendant does not constitute withdrawal as a matter of law, it is sufficient unless the Government comes forward with evidence of continued participation. We find difficulty in reconciling such broad statements with what the Supreme Court said in *Hyde*; we see no basis for thinking that if in that case the defendant Schneider had been incarcerated for an unrelated offense more than three years before the indictment, the Court would have ruled one whit differently. The expressions cited are an expectable judicial reaction to extravagant claims of prosecutors that a few acts of assistance by persons on the periphery warrant a jury's finding an agreement to participate forever in the activities of the central core; our approach to that claim permits the defense of withdrawal to be confined in a manner more consistent with reason and with the authorities earlier cited. Some of the opinions suggested this precise ground that the agreement of a particular defendant might not be co-terminous with the over-all conspiracy. *Buhler* v. *United States*, 33 F. 2d 382, 385 (9 Cir. 1929) [not an arrest case]; *Poliafico* v. *United States*, 237 F. 2d 97, 105-06 (6 Cir. 1956), cert. denied, 352 U. S. 1025 (1957). In *Fiswick* v. *United States*, *supra*, 329 U. S. at 217, *Cleaver* v. *United States*, 238 F. 2d 766, 769 (10 Cir. 1956), and *Gay* v. *United States*, 322 F. 2d 208 (10 Cir. 1963), the confessions of co-conspirators after arrest were ruled inadmissible since, far from furthering

the purposes of the conspiracy, they frustrated it; such confessions, if complete, would be sufficient to make out a withdrawal. The declarations in *United States* v. *Carminati*, 247 F. 2d 640, 645-46 (2 Cir.), cert. denied, 355 U.S. 883 (1957), also were merely narrative and therefore inadmissible. The "core" members of the conspiracy were incarcerated in *United States* v. *Russano*, 257 F. 2d 712 (2 Cir. 1958); this was held to have brought the conspiracy to an end. In the cases not thus distinguishable, *Sandez* v. *United States*, 239 F. 2d 239, 243 (9 Cir. 1956), rehearing denied, 245 F. 2d 712 (1957), and *United States* v. *Consolidated Laundries Corp., supra*, 291 F. 2d at 573-74, as well as in *Cleaver* v. *United States, supra*, 238 F. 2d at 769, and *United States* v. *Carminati, supra*, 247 F. 2d 640, the defendant had been arrested for the very offense charged in the conspiracy indictment. Assuming without deciding that the unlikelihood of the other conspirators' relying for further aid on a person known to be confined for the very offense in which they were engaging makes such confinement a sufficient "affirmative act" to sustain the defense of withdrawal in the absence of countervailing evidence—and that a holding to that effect would be permissible under the *Hyde* opinion, this would not serve Cinquegrano who pleaded guilty to an unrelated narcotics offense—and we see no basis for going further. We therefore overrule Cinquegrano's claim that his 1956 incarceration entitled him to acquittal under the statute of limitations as a matter of law. Proof of his conviction was offered only to the court in a motion for acquittal; if on retrial Cinquegrano chooses to place the fact in evidence, this will raise a question for the jury on the issue of his withdrawal.

IV. *Rulings with respect to Rinaldo's prior statements and to grand jury testimony*

In addition to the reasons in Part II of this opinion, we would be required to reverse, at least as to certain appellants, because of rulings on two issues relating to Rinaldo's testimony.

Rinaldo had been taken into custody by the Westchester County police in 1960 and had made long statements, in question and answer form, in the presence of Federal narcotics agents, the transcript of which was made available to defense counsel.[10] During his cross-examination, in a number of instances where counsel considered the earlier statements more favorable, Rinaldo affirmed that in his prior answers, as well as in those at the trial, he was telling the truth.

When a witness thus affirms the truth of a prior statement, the earlier statement is to be considered "not only as bearing on the credibility of the witness but as affirmative evidence." *Stewart* v. *Baltimore & Ohio R.R.*, 137 F. 2d 527, 529 (2 Cir. 1943); the trier of the facts has "two conflicting statements . . . of equal force as evidence," *Zimberg* v. *United States*, 142 F. 2d 132, 136 (1 Cir.), cert, denied, 323 U. S. 712 (1944). See also *Harman* v. *United States*, 199

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[10] We see no reason why the tape recordings of the interview, insofar as these related to Rinaldo's direct testimony, should not have been played to defense counsel to permit them to make their own determinations of the accuracy of the transcript rather than having to rely on the judge's, although the failure to do this was, in all likelihood, not prejud al. Use of the tape recordings before the jury would have been ifferent matter, as to which the judge could well have require preliminary showing of discrepancy. See *United States* v. *Mc ver*, 271 F. 2d 669, 676 (2 Cir. 1959).

F. 2d 34, 36 (4 Cir. 1952); *Finnegan* v. *United States*, 204 F. 2d 105, 115 (8 Cir.), cert. denied, 346 U. S. 821 (1953).[11] In the discussions of requests to charge, the judge indicated that, consistently with these authorities, he would allow the jury to consider Rinaldo's prior statements as being affirmative evidence and not merely as impeaching credibility. But we do not read the instruction given as carrying this out. Defense counsel, who did not regard it as having done so, took proper exception, but the judge declined to alter it. There is, indeed, a question whether this error alone would require reversal. The prior statements relating to Rosario's continued participation after incarceration and to the definitiveness of Locascio's retirement in 1956, could well be viewed merely as quick characterizations and hence as not truly inconsistent with the trial testimony. Still a jury would not necessarily consider them in that light, and with the Government's case so dependent on Rinaldo's testimony, we could hardly be certain that the error might not have affected the two defendants primarily concerned.

Taking full advantage of the ruling, in *Costello* v. *United States*, 350 U. S. 359 (1956), that an indictment may be based on hearsay, the Government did not bring Rinaldo before the grand jury but instead had Selvaggi, a federal narcotics agent, tell the story Rinaldo had told him. Called as a defense witness on some minor matters, Selvaggi

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[11] This principle long antedates and is quite different from our decision in *United States* v. *De Sisto*, 329 F. 2d 929 (2 Cir.), cert. denied, —— U. S. —— (1964), that two kinds of prior statements by a witness under examination—testimony on a former trial and before a grand jury (together with identifications affirmed by such testimony)—may be considered as independent evidence even though the witness *repudiates* them at the trial.

admitted that "a certain portion of" Rinaldo's trial testimony was inconsistent with his narration of it to the grand jury. Defense counsel then joined in a motion that the court inspect the grand jury minutes to determine these inconsistencies and make the relevant minutes available. The judge declined to do this except for inconsistencies between Selvaggi's own grand jury and trial testimony.

If Rinaldo had testified before the grand jury, the defendants would have been entitled to have the judge inspect the minutes and turn over any parts useful for cross-examination. *United States* v. *Zborowski*, 271 F. 2d 661, 665-68 (2 Cir. 1959); *United States* v. *Hernandez*, 282 F. 2d 71 (2 Cir. 1960), on rehearing, 290 F. 2d 86 (1961). The Government ought not be allowed, by having its principal witness speak to the grand jury through the voice of another, to deprive a defendant of this right to impeach by contradiction. It is true that inconsistencies found in the grand jury testimony of such a surrogate are less susceptible of effective use than if the witness himself had testified; when the witness is confronted with what appears to be an inconsistency, he may deny having made the contradictory statement to the agent and counsel's only recourse would be to call the agent and endeavor to have him prove the contrary. But this is not a sufficient reason for the court's refusing to open this avenue of impeachment; whether it is worth pursuing will then be for counsel to decide. We have reviewed Selvaggi's grand jury testimony and have found some differences between what he said Rinaldo had said and what Rinaldo said at the trial; although these are

hardly nation-shaking, we cannot say that none would be susceptible of effective use.[12]

IV. *Other matters*

Although our direction of a new trial makes it unnecessary to consider many points dealing with matters not likely to recur, we wish to mention one of these because of the serious implications that it and incidents in other cases, cf. *United States* v. *Gersh*, 328 F. 2d 460 (2 Cir.), cert. denied, —— U. S. —— (1964), have for the administration of criminal justice under the jury system.

During the trial seven jurors received unsigned letters reading in substance:

> "Find these guinea sons of bitches guilty. Don't let them get away with something they did a long time ago. Send them to jail now, all those Mafia bums."

Some of the jurors considered the notes as threats, with a meaning opposite to what they said. The incident received careful and sensitive attention from the judge, the alleged inadequacy of which we need not consider in view of our disposition of the case. But it demonstrates the need for precautions assuring that the addresses, and perhaps even the names, of jurors in cases such as this will be held in confidence; courts must protect the integrity of criminal trials against this kind of disruption, whether it emanated from defendants' enemies, from their friends, or from neither.

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[12] In contrast, the judge's refusal to inspect Rinaldo's grand jury testimony in *United States* v. *Agueci* was a proper exercise of discretion; Rinaldo's testimony in that trial was available, and there is nothing to suggest that his grand jury testimony concerned any facts relevant to this case.

It remains to deal briefly with certain rulings on questions of evidence that may recur on a new trial. Two of these related to the examination of Ager. The defense had questioned him as to a statement he had given to the Government, in which he minimized his acquaintance with Bourbonnais and denied making any deliveries; Ager said the prior statement was false, and the judge then declined to receive it. The judge should have permitted the written statement to be introduced as affecting Ager's credibility rather than to force the defense to rely for impeachment solely on Ager's fleeting oral admission that he had lied on the earlier questioning. 3 Wigmore, Evidence §§1017, 1037 (1940 ed.); but *cf.* McCormick, Evidence 68 (1954). Ager had referred to the suitcases as having "16 units"; he later amplified this to 16 kilograms. When pressed by the Government for further explanation, he said "it must have been narcotics." On this being ruled out, the prosecutor, over objection, was allowed to ask "Do you know now what was in those suitcases?", which elicited substantially the same answer as had been rightly stricken; the objection should have been sustained in the absence of a showing that Ager was giving "an impression derived from the *exercise of his own senses,* not from the reports of others," or from speculation based on the high price paid. 2 Wigmore, Evidence, §657(a) (1940 ed.).

Complaint is made of the refusal to compel the Government to turn over certain material in its files relating to Sierra. As in the case of Rinaldo's interview, see fn. 10, we can see no reason why portions of the tape recording of Sierra's interview which related to his testimony should not have been made available to defense counsel to enable them

to be satisfied, as the judge was, with respect to the accuracy of the transcripts. More important was the refusal to turn over Sierra's letter of August 29, 1960, offering his assistance to the Government "providing we can come to some kind of an agreement" and that "some thing can be done for me," and soliciting "a talk as to whether some sort of arrangements can be made to benefit the U. S. Government and myself. I am sure everyone in question will be very satisfied." The Government says this was properly refused since it did not "relate" to the subject matter as to which the witness had testified, within the meaning of the Jencks Act, 18 U. S. C. §3500, and that in any event the refusal was not prejudicial in view of rather similar statements in the transcript of Sierra's interview. We need not pass on the latter contention, but the former is surely erroneous. We can see no reason why a statement that would support impeachment for bias and interest does not "relate" to the witness' testimony as much as a statement permitting impeachment for faulty memory, *Rosenberg* v. *United States*, 360 U. S. 367, 370 (1959). If "relate" were to be limited to factual narratives, we should have to consider whether a letter merely proffering a witness' services in return for consideration was within the protection which the Jencks Act confers upon the Government; but we think the broader construction preferable and, indeed, necessary. See *Palermo* v. *United States*, 360 U. S. 343, 350 (1959). We add our wonder at the Government's willingness, not unique to this case, to imperil convictions hoped to be obtained after immense effort, by cavilling over the delivery of such a paper, whose admission would not add appreciably to the strength of the defense but whose erroneous exclusion might

lie just beyond an appellate court's power of rescue under the harmless error rule.

A few further matters in conclusion: We approve the admission of the declarations of one Renna, made in 1957 immediately after a meeting with Locascio which Rinaldo had arranged at Joe Mogavero's request, "that he [Renna] seemed to think that everything with the Canebas and Locascio was all right." There was ample evidence that Renna, as the Canebas' messenger, had joined with Locascio and the Mogaveros in the "Italian" phase of the conspiracy which was still being wound up, and the remark, in its setting, could be construed as indicating there was some thought of reviving the partnership and the Italian source of supply. On the other hand, a statement by Renna, on a chance encounter with Rinaldo in April or May, 1959, that he thought the difficulties which Joe Mogavero and Locascio had had with the Canebas had been resolved, would better have been excluded, both because of the lack of evidence that any bond with Renna still existed and because this declaration, made after Rinaldo's severance with Joe Mogavero, appears to have been narrative only. The incident with respect to the use of a prior consistent statement by Rinaldo as to the date when he began deliveries to Sedotto will hardly recur in the same form; it suffices to note that this circuit has disapproved of rehabilitation in that manner. *United States* v. *Sherman*, 171 F. 2d 619, 621-22 (1948), cert. denied *sub nom. Whelan* v. *United States*, 337 U. S. 931 (1949), but see *Baber* v. *United States*, 324 F. 2d 390, 394 (D. C. Cir. 1963), cert. denied, —— U. S. —— (1964). The Government's bills of particulars should not have been sent to the jury in the absence of any request

omits part; the accusation is that made in the indictment, and submission of bills of particulars, even if accompanied, as here, by instructions that they are not evidence, is likely to be confusing. Cf. *Pipkin* v. *United States*, 243 F. 2d 491, 494 (5 Cir. 1957).

The Court is indebted to Jerome J. Londin, Ernst H. Rosenberger, Eve M. Preminger and Harvey P. Dale, Esqs., assigned counsel, for forceful presentations in behalf of the appellants whom they represent.

Reversed for a new trial as to all defendants in a manner consistent with this opinion.

APPENDIX B

Judgment of United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirty-first day of July, one thousand nine hundred and sixty-four.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK BORELLI, et al.,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgments of said District Court be and it hereby is reversed for a new trial as to all defendants in a manner consistent with the opinion of this court.

A. DANIEL FUSARO
Clerk

APPENDIX C

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1964

BENEDETTO CINQUEGRANO,

Petitioner,

vs.

UNITED STATES

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above entitled cause be and the same is hereby extended to and including Sept. 29, 1964.

/s/ ARTHUR J. GOLDBERG
Associate Justice of the Supreme Court of the United States

Dated this 24th day
of August 1964

APPENDIX D

Statutes Involved

TITLE 21, SECTION 173, UNITED STATES CODE

173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*—It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily

forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, §2, 35 Stat. 615; Jan. 17, 1941, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, §3, 46 Stat. 586.)

TITLE 21, SECTION 174 UNITED STATES CODE

174. Same; penalty, evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Appendix D—Statutes Involved

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, Title I, §105, 70 Stat. 570.)

TITLE 18, UNITED STATES CODE, §3282

§3282. *Offenses not capital.*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 541

BENEDETTO CINQUEGRANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 546

ROSARIO MOGAVERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Apps. 1a-33a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1964. On August 24, 1964, Mr. Justice Goldberg extended the time for filing petitions for writs of certiorari to and including September 29, 1964. The petition in No. 541 was filed on September 26, 1964, and the petition in No. 546 was filed on September 29, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on reversing petitioners' convictions, the court of appeals should have granted judgments of acquittal rather than ordering a new trial.

2. Whether various rulings at the trial were proper.

STATEMENT

Petitioners and nine others were convicted * in the Southern District of New York under an indictment which charged a conspiracy between January 1950 and August 15, 1962 (the date of the filing of the indictment) to violate the narcotic laws. The evidence presented to the jury to establish the conspiracy is detailed in the opinion below (No. 541, Pet. App. 4a-8a). Briefly it revealed that in 1950 petitioner Rosario Mogavero, acting with his brother Joseph and one Locascio, hired Salvatore Rinaldo to import heroin; that subsequently Rinaldo made perio-

* The jury acquitted five other defendants.

dic deliveries of heroin to various wholesalers, including petitioner Cinquegrano; that in 1953 shortly before Rosario Mogavero was imprisoned under an eight-year State sentence he told Rinaldo to act as he had before and to take orders from his brother and Locascio as if the orders came from Rosario; and that thereafter this narcotic business continued its operations.

A number of defendants, including petitioners, raised at the trial and contended on appeal both that the conspiracy proved was not a single one and that they had not been shown to be members of the conspiracy during the applicable period of limitations. The court of appeals, while finding the proof sufficient to permit a finding of a single continuous conspiracy as to some defendants, held that the judge's instructions had not sufficiently focused for the jury the necessity, particularly in view of the limitations problem, of holding a particular defendant liable only for that part of the continuing conspiracy to which it could reasonably be inferred he agreed. Accordingly, it reversed the judgments of conviction and remanded the case for a new trial.

The court rejected both petitioners' contentions that the evidence established as a matter of law that they had withdrawn from the conspiracy before August 15, 1957, the date beyond which a prosecution would have been barred by the statute of limitations. As to Rosario Mogavero (No. 546), it found that evidence of his participation after his imprisonment "was strong enough for the jury to find that, far

from withdrawing, he continued to be a significant member of the conspiracy" (Pet. App. 24a).

The government's evidence as to Cinquegrano (No. 541), while showing a conspiracy into 1959, did not show a delivery to Cinquegrano after 1955. After the government rested, Cinquegrano asked the court to acquit him, submitting papers establishing that he had been imprisoned under a federal narcotics charge between May 1956 and March 1958. He did not offer this evidence to the jury and objected to any instructions presenting this issue of withdrawal for the jury's determination (Tr. 2784-2786, 2790-2791). The court of appeals held that Cinquegrano's incarceration for an unrelated narcotics offense did not in itself show his withdrawal from the conspiracy and entitle him to a judgment of acquittal under the statute of limitations. It ruled that "if on retrial Cinquegrano chooses to place the fact in evidence, this will raise a question for the jury on the issue of his withdrawal" (Pet. App. 25a).

ARGUMENT

1. There is no occasion for this Court to review the judgment of the court of appeals remanding the case for a new trial as to petitioners and refusing to direct a judgment of acquittal.

As to Mogavero (No. 546), the court of appeals was clearly justified in finding that the evidence introduced at the trial was sufficient to justify a jury finding that, while incarcerated, he remained in the conspiracy, supervising and financing it. The argument (No. 546, Pet. 10-18) that the government

failed to show that he knew of the illegal importation of the narcotics dealt with by his co-conspirators within the period not barred by limitations adds nothing of significance to his contention of withdrawal. The conspiracy which he formed and directed was to import as well as deal in the imported narcotics. The proof that he continued a member of that conspiracy, which operated as before to import and sell, would be sufficient to justify an inference that he knew that importation continued to be one of the objects of conspiracy.

As to Cinquegrano (No. 541) the court of appeals has made it clear that, on retrial, the issue of his withdrawal can be a question of fact for the jury. It has merely refused to hold that, as a matter of law, his imprisonment necessarily and conclusively established his withdrawal from the conspiracy. Petitioner argued that, since the government did not offer evidence to show that he continued in the conspiracy after his incarceration, he should have been acquitted as a matter of law. However, the government was not required to offer such evidence, because petitioner never put before the jury any evidence that he had in fact withdrawn from the conspiracy. Petitioner had the burden of going forward with evidence to prove his withdrawal. *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 573 (C.A. 2). Since the issue of withdrawal is for the jury, petitioner did not meet his burden of going forward by placing evidence of his imprisonment before the trial judge alone. Thus the refusal of the court of appeals to determine whether Cinquegrano was entitled to an acquittal on this ground was reasonable. It was a

proper exercise of its power to fashion relief upon the review of a criminal case. *Forman* v. *United States*, 361 U.S. 416.

2. The other arguments raised by Mogavero relative to the admissibility of the evidence, the instructions (No. 546, Pet. 22-26), and the use of tape recordings at a retrial (No. 546, Pet. 26-29) do not merit review at this interlocutory stage. The declarations of petitioner's brother were properly admitted as statements in furtherance of a conspiracy, since there was evidence of petitioner's own declaration that he was continuing in the conspiracy while in jail. Whether the defense, in cross-examining Rinaldo at the retrial, should be allowed to use the tape recording of his statements made to narcotic agents, as well as a transcript of the recordings, is a matter which the court below properly left to the trial court's discretion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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Solicitor General.

HERBERT J. MILLER, JR.,
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OCTOBER 1964

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